UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 18-cr-80166-MIDDLEBROOKS

UNITED STATES OF AMERICA,

v.

NICHOLAS WUKOSON.

Defendants.
_____/

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE comes before the Court on Defendant Nicholas Wukoson's Motion to Suppress Search Warrant, filed on March 13, 2019. (DE 55). The Government responded on March 14, 2019. (DE 58). For the following reasons, Defendant's Motion is denied.

Defendant moves to suppress on the basis that the Affidavit filed in support of the search warrant contains statements that the affiant knew to be false or made in reckless disregard of the truth, and that without these statements, the Government cannot demonstrate probable cause for the search. The Affidavit states that on September 25, 2017, "law enforcement successfully completed the download of several video files depicting child pornography" that were made available by an IP address later linked to Defendant. (DE 55 at 23). The Affidavit goes on to summarize the contents of three videos as "a sample" of the "several" files downloaded by law enforcement. (DE 55 at 23–24).

Based on the findings of a forensic expert, Defendant argues that on the date in question, only one of the three videos was completely downloaded by law enforcement and that the downloads were not located on both of Defendant's computers but on an older computer which Defendant's expert attests was last used on February 1, 2017.

ANALYSIS

Affidavits supporting arrest warrants are presumptively valid. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). In order to be entitled to an evidentiary hearing on a motion to suppress based on alleged misrepresentations or omissions in a search warrant affidavit, a defendant must make a substantial preliminary showing that the affiant made false statements, either intentionally or with reckless disregard for the truth, pointing specifically to the portions of the affidavit claimed to be false, and that the false statements were necessary to the finding of probable cause. *United States v. Kapordelis*, 569 F.3d 1291, 1309 (11th Cir. 2009) (citing *Franks*, 438 U.S. at 171).

A. Download Percentage

While the Affidavit states that "law enforcement successfully completed the download of several video files," Defendant's forensic expert found that only one of the three videos described in the Affidavit were downloaded in full. The other two were downloaded only in part: approximately 17% and 8%, respectively. Despite this discrepancy, Defendant fails to make a substantial preliminary showing that the Affidavit contains deliberately or recklessly false statements.

A party need not show by direct evidence that the affiant makes an omission recklessly. *Madiwale v. Savaiko*, 117 F.3d 1321, 1327 (11th Cir. 1997). Rather, it "is possible that when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself." *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980). Omissions that are not reckless, but are instead negligent, or insignificant and immaterial, will not invalidate a warrant. *See id.*; *United States v. Reid*, 69 F.3d 1109, 1114 (11th Cir. 1995), *cert. denied sub.*

nom. Miller v. United States, 517 U.S. 1228 (1996). In the context of the Affidavit, I find that the discrepancy in download percentages is an insignificant omission insufficient to invalidate the warrant. *See Beard v. City of Northglenn, Colo.*, 24 F.3d 110, 116 (10th Cir. 1994) ("The failure to investigate a matter fully, to 'exhaust every possible lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence' rarely suggests a knowing or reckless disregard for the truth.") (citing *United States v. Dale*, 991 F.2d 819, 844 (D.C. Cir.) (internal citation omitted), *cert. denied*, 510 U.S. 906 (1993)).

Even if Defendant could show that the Affidavit was deliberately or recklessly false with respect to the downloads, he fails to meet his burden on the second prong of the *Franks* analysis: "[I]ntentional or reckless omissions will invalidate a warrant only if inclusion of the omitted facts would have prevented a finding of probable cause." *Madiwale*, 117 F.3d at 1327. Once these omissions are removed, a court is to look at the remainder of the affidavit to determine whether including the omitted facts would have prevented a finding of probable cause. *Id.* The defendant bears the burden of showing that "absent those misrepresentations or omissions, probable cause would have been lacking." *United States v. Novaton*, 271 F.3d 968, 987 (11th Cir. 2001). Defendant has not met this burden. Even if reference to the two partially-downloaded videos were removed from the Affidavit, it would still present sufficient factual details to support a finding of probable cause based solely on the description of the third video, the download of which was in fact "successfully completed" by law enforcement.

B. Defendant's Two Computers

Defendant next argues for suppression on the basis that the three video files described in the Affidavit were found on Defendant's old computer but not his new computer. (Both computers were searched pursuant to the warrant.) Defendant's expert simultaneously 1)

states that the older computer was last used on February 1, 2017; 2) acknowledges that the three videos described in the Affidavit were downloaded by law enforcement in whole or part on September 25, 2017; and 3) states that the three videos were on Defendant's old computer, recovered by law enforcement from Defendant's hall closet, but were not among the files on the new computer. (DE 55 at 3–4). The Parties appear to agree on the proposition that law enforcement could not have downloaded the files unless the source computer was on and connected to the Internet.

It is not clear how Defendant asks the Court to resolve this paradox. Defendant states that the fact that the old computer had not been used since February 1, 2017 "destroys the veracity of the assertions contained in the above affidavit" but does not further elaborate. (DE 55 at 4). The Government suggests the discrepancy indicates that the files were deleted from the new computer. Insofar as the Court construes Defendant's argument to be that the mismatch between the dates signifies that the three videos could not have been downloaded from Defendant, this argument is defeated by Defendant's concession that the three videos were in fact downloaded by law enforcement on September 17, 2017 from a computer connected to the Internet at the IP address registered to Defendant.

The first prerequisites to an evidentiary hearing on a motion to suppress are a substantial preliminary showing that the affiant made false statements, either intentionally or with reckless disregard for the truth, and a specific indication of which portions of the affidavit are claimed to be false. *Kapordelis*, 569 F.3d at 1309 (citing *Franks*, 438 U.S. at 171). Defendant's second argument fails to make any such showing, substantial or otherwise, and Defendant's motion is to be denied without a hearing. *See Franks*, 438 U.S. at 171 ("To

mandate an evidentiary hearing, the challenger's attack must be more than conclusory . . . .").

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion to Suppress (DE 55) is **DENIED**.

SIGNED in Chambers at West Palm Beach, Florida, this 20 day of March, 2019.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record